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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1232 OF 2002

Mahesh Laxman Kore ... Appellant

V/s.

The State of Maharashtra ... Respondent

Mr.Nitin Pradhan with Mrs.S.D. Khot and Mr.Mohan Pradhan for Appellant
Mrs.M.M. Deshmukh, APP, for Respondent State

CORAM: **S.B. MHASE &**
SMT.NISHITA MHATRE, JJ.

DATED: **MARCH 1, 2007**

ORAL JUDGMENT (PER SMT.MHATRE, J.):

. The accused appellant has challenged the judgment and order of the Adhoc Additional Sessions Judge, Kolhapur. By this judgment, the accused has been found guilty of the offence punishable under section 302 of the Indian Penal Code and has been sentenced to rigorous imprisonment for life. He has been acquitted of the offence punishable under section 201 of the Indian Penal Code.

2. The case of the prosecution is that the accused was married to Vaishali, the victim for two years prior to the death of Vaishali. They lived in Shiradwad. On 16.3.2001, the couple left Shiradwad and went to Rui where Vaishali's parents lived and Kagal to her maternal uncle's house. They travelled on a newly purchased motor cycle. They had tea at Kagal and then left for

Sangavade where the grandfather of the accused No.2 lived. The prosecution alleges that while travelling on the motor cycle, the couple met with a minor accident in which Vaishali sustained some minor abrasions. After having a drink of water from person who lived near the spot, the couple proceeded on their way to Kagal. It is the case of the prosecution that before reaching that spot, the accused desired to have sexual intercourse with his wife. However, she resisted his advances. The prosecution alleges that the accused was enraged by this and banged the victim's face on the road and throttled her to death. Thereafter he placed Vaishali's corpse near a stone quarry and left for Kagal. On reaching Kagal, he purchased two gunny bags, jute thread from another shop and returned to where he had placed the dead body of the victim. He enveloped the dead body with the two gunny bags and tied them with the jute thread. After travelling with it for a short distance on his motor cycle, he threw the bag containing the dead body into the Panchaganga river. He returned home on the next day i.e., on 17.3.2001. At about 1 pm on 17.3.2001, Vaishali's mother Shakuntala arrived at his house to invite her daughter for the festival in their village, Rui. The accused informed Vaishali's mother that he had left Vaishali at her house in Rui. Shakuntala returned home and found that Vaishali was not there. Earlier during the day at about 11 am, the accused met Sanjay Kore, Vaishali's cousin, and informed

him that he and Vaishali had visited the temple at Sangavade and Vaishali was missing thereafter. Sanjay and the accused then went in search of Vaishali at Kagal and Rui. On the morning of 18.3.2001, Vaishali's maternal uncle who lived in Kagal suggested that the accused bring a photograph of Vaishali in order to file a complaint with the police stating that Vaishali was missing. The prosecution alleges that the accused did not return on 18.3.2001. Thereafter a police complaint was filed by Vaishali's maternal uncle, Shankar Mardane with the Kagal police station at about 10.30pm on 18.3.2001. The prosecution alleges that the accused sold his motor cycle and left from Ichalkaranji for Mumbai with the sale proceeds on 18.3.2001. He returned to Shiradwad on 23.3.2001 and lodged an FIR with the police. The prosecution alleges that this was in fact a confessional statement on the basis of which he was arrested. Thereafter he led the police to the spot where he had thrown the gunny bag containing Vaishali's corpse. An inquest panchanama was drawn and a postmortem examination was conducted by the medical officer who opined that the death had occurred due to asphyxia on account of throttling. External injuries like abrasions and bruises were seen. On internal examination it was found that the hyoid bone had been broken. There were depressed fractures on the frontal bone, maxillary bone, orbital bone, all on the right side. The crime was registered on 23.3.2001 at 10.30

pm. A chargesheet was filed against the accused. His trial was committed to Sessions. The Sessions Court has convicted and sentenced the accused under section 302 of the Indian Penal Code.

3. The case of the prosecution is entirely based on circumstantial evidence. The circumstances on which the prosecution has relied on are: i) the accused and the deceased Vaishali were last seen together; ii) the accused purchasing gunny bags and jute rope from the shops in Kagal; (iii) the absence of any genuine explanation from the accused when Vaishali was found missing; iv) the conduct of the accused in not approaching the police immediately after finding that Vaishali was missing; v) the accused not returning to Kagal with the victim's photograph as requested by her maternal uncle, in order to file a complaint with the police; vi) the accused approaching the police on the 7th day after the incident and admitting that he had thrown the victim's body in the Panchaganga river and; vii) the discovery of the dead body at the instance of the accused.

4. The prosecution has examined PW6, PW7, PW8 and PW11 to support its theory of the victim having been seen last in the company of the Appellant. PW7, Shakuntala, the victim's mother claims that they visited her in Rui at 4.30 pm on 16.3.2001. PW8, the victim's

cousin, has stated that the couple had tea with him at his house in Rui. PW6 speaks about the couple meeting him at his residence at 7.30 in the evening. He has stated that they proceeded on their way to Sangavade at about 8.15 pm.

5. PW11 who resides near the Kagal Sangavade road, has deposed that the accused and a woman came to her field in the evening for a drink of water. There is no doubt that the accused and the victim were last seen together at about 8.15 pm on the night of 16.3.2001. In fact PW6 was the last person to have seen them before they proceeded towards Sangavade. However, this by itself would not in our opinion lead to conclusion that it is the accused who had committed the crime. A husband and wife seen together at 8.15 at night is not unusual nor does it establish that the accused had murdered his wife. In fact, the accused and the victim being seen together at 8.15 pm is a natural conduct of the couple and, therefore, the prosecution’s theory that the accused is guilty of offence under section 302 of the Indian Penal Code is not advanced by this circumstance.

6. The next circumstance relied on by the prosecution is that the Accused purchased gunny bags and jute rope. PW9 and PW10 deposed that the Appellant purchased jute rope and gunny bags, respectively from

them. While PW9 has stated that he was unable to identify the several customers who made purchases at his shop each day, PW10 has claimed that he could identify each customer who visited his shop but not the gunny bags as they did not bear any special mark. Both these witnesses claim that they were called to the police station in Kagal on 24.3.201 to identify the Appellant. These witnesses appear to be got up witnesses. Their testimonies do not have a ring of truth. The prosecution thus has failed to prove that the Appellant purchased the jute rope and gunny bags from PW9 and PW10 respectively.

7. The prosecution has then sought to prove the next circumstance against the accused that he had not given any genuine explanation when Vaishali was found missing. PW7, Shakuntala has stated that the accused told her on 17.3.2001 when she met him at 1 pm that he had dropped the victim off in Rui and when she returned to Rui she did not find the victim there. PW8 Sanjay, the victim’s cousin has deposed that on 17.3.2001 at about 11 am the accused visited him at his workplace and informed him that he and the victim had reached Sangavade at about 9.30 am that morning. According to this witness the Appellant informed him that he found the victim was missing when he came out of a temple where they had prayed. According to this witness, the accused stayed the night with him on 17.3.2001 after

visiting his own home in Shirdwad. PW6 Shankar, the maternal uncle has stated that on 17.3.2001 the accused visited him in the evening and informed him that the victim was missing since the morning after she had visited the temple at Sangawade with the accused. This story of the accused is consistent; that the victim was standing outside the temple while he was praying inside the sanctum sanctorum and when he came out of the temple he found her missing on 17.3.2001. Thus, there is no proof that the victim had died between 8.15 pm on 16.3.2001 (when PW6 had last seen the couple together) and 11 am on 17.3.2001 (when the accused met PW8 at his workplace). The prosecution has brought no evidence on record to show that Vaishali had died during the interregnum. There is no evidence on record to indicate as to whether the couple had spent the night at Kagal or at Sangavade. The time of death has not been established by the prosecution. The case of the prosecution, that the victim has invented a false story has not been established since there is no evidence on record to the contrary.

8. The prosecution has then relied on the next circumstance that is that the accused did not approach the police immediately after finding that the victim was missing and instead approached the police on the 7th day after the victim disappeared. The mere fact that the accused did not approach the police immediately cannot

be a circumstance against the accused.

9. Another circumstance which the prosecution has relied on is that the conduct of the accused belied his innocence as he did not return to the house of PW6 with the victim's photograph on 18.3.2001 and approached the police only on 23.3.2001. There is evidence on record to indicate that he and PW8 searched for the victim. There is no evidence on record to indicate as to why it was necessary to send the accused all the way to his village Shirdwad for the victim's photograph, when the victim's mother who was in Rui could easily have had one in her possession. There is also no evidence on record as to why if the accused had not returned with the photograph on 18.3.2001, none of the relatives of the victim suspected that the accused had done away with the victim. None of these relatives complained to the police that they suspected the accused although they lodged a missing report with the police at Kagal on 18.3.2001. Taking all the aforesaid circumstances into account we are unable to reach the conclusion that a chain of circumstances has been established by the prosecution and that the only hypothesis possible is that the Appellant has committed the offence.

10. The First Information Report was lodged by the accused On 23.3.2001 at 10.30 pm. The prosecution contends that this in fact is a confessional statement

of the accused and on this basis he must be found guilty of having murdered his wife. According to the prosecution, the accused had disclosed to the police that he had thrown the corpse into the Panchaganga river after tying it in gunny bags. The arrest panchanama of the accused has been witnessed by PW2. This witness has spoken about the accused having led him and the police officers to the spot where he had killed the victim. Pieces of bangles found there were attached by the police. A jute rope was also found on the road and was attached. This panchanama was drawn up on 24.3.2001. PW3 has deposed regarding the arrest panchanama. He claims that the arrest panchanama was drawn up in the police station at about 3.30 pm on 23.3.2001. PW5 is the witness who has deposed to the recovery of the gunny bag containing the dead body. This panchanama was recorded at about 1.15pm. PW1 has proved the inquest panchanama. Significantly this panchanama has been drawn up between 12 noon and 1 pm. If the recovery of the dead body and the panchanama at Exhibit 15 are to be believed, the inquest panchanama at Exhibit 17 cannot be accepted as it has been recorded prior in point of time. This casts a doubt about the recovery of the body itself.

11. The First Information Report which according to the prosecution is a confessional statement by the accused cannot be accepted as evidence. It is well

settled that such a statement is inadmissible. The Privy Council in the case of *Kottaya v/s. Emperor,* **AIR (34) 1947 Privy Council 67** has observed that the section is brought into operation when a person in police custody produces some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. In the case of *Aghnoo Nagesia v/s. State of Bihar,* **1966 Cri.L.J. 100 (Vol.72, C.B. 30)**, the Supreme Court dealt with the scope of sections 24 to 30 of the Evidence Act. It has held that on a plain construction, sections 25 and 26 of the Evidence Act bar not only proof of admissions of an offence by an accused to a police officer, made by him while in custody of a police officer but also admissions contained in a confessional statement of all incriminating facts relating to the offence. The Supreme Court has held in para 18 of the judgment as follows:

> 18. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by S.25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of S.25 is lifted by S.27.

Thus, the provisions of section 27 apply only to information received from a person accused of an offence and who is in the custody of a police officer.

12. In the case of *Vijender v/s. State of Delhi*, **(1997) 6 SCC 171,** the Supreme Court observed that if the information given by the accused leads to the discovery of a fact which is the direct outcome of such information it could be evidence but when such a fact has already been discovered the evidence could not be led in respect thereof.

13. In the case of *Anter Singh v/s. State of Rajasthan,* **(2004) 10 SCC 657**, the Supreme Court laid down various conditions which must be fulfilled under section 27 before the discovery of a fact in consequence to the information received from a person accused of an offence is admissible. The various requirements have been summed up by the Apex Court as follows:

> 16. ... (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
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> (2) The fact must have been discovered.
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> (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
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> (4) The person giving the information must be accused of any offence.
>
> (5) He must be in the custody of a police officer.
>
> (6) The discovery of a fact in consequence of

> information received from an accused in custody must be deposed to.
>
> (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

Thus, in our opinion, the FIR cannot be treated as a confessional statement which is admissible and the alleged discovery of the dead body at the instance of the accused also cannot be accepted as circumstances pointing to the guilt of the accused.

14. In our view, therefore, the prosecution has failed to establish that the only inference which is possible from the circumstantial evidence on record points to the guilt of the accused. In the case of **Sharad Birdhichand Sarda v/s. State of Maharashtra, (1984) 4 SCC 116,** the Supreme Court has elaborately considered its earlier decisions and has held that the primary principle is that the accused "must be" and not merely "may be" guilty before a Court can convict him. Five golden principles were evolved which according to the Supreme Court constitute the "panchasheel of the proof of a case based on circumstantial evidence": (i) The circumstances from which the conclusion of the guilt is to be drawn should be fully established. (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say they should not be explainable on any other hypothesis except that the accused is guilty. (iii) The

circumstances should be of a conclusive nature and tendency (iv) They should exclude every possible hypothesis except the one to be proved, and (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. Testing the evidence led before the trial Court on the touchstone of these principles we are unable to reach the conclusions which have been drawn by the trial Court. The circumstantial evidence which is on record does not in our opinion lead to the only possible conclusion that the accused is guilty. The circumstances which have been established are (i) that the accused and the deceased were last seen together at about 8.15 pm on 16.7.2001; (ii) that the accused complained to PW8 that his wife was missing on 17.7.2001 at 11 am and; (iii) that he did not return with his wife’s photograph in order to file a police complaint.

16. As aforesaid, in our opinion these circumstances do not lead to the only hypothesis that it is the accused who is guilty of having murdered his wife. That the victim’s death was homicidal has been proved but there is no evidence to connect the accused to the homicidal death of the victim. In such circumstances,

the findings of the trial Court must be set aside.

17. Appeal allowed accordingly.

18. The conviction and sentence of the accused/appellant under section 302 of the Indian Penal Code is hereby set aside and the accused/appellant is acquitted of the said offence. The accused be released and/or set at liberty if not otherwise required in any other offence.

(NISHITA MHATRE, J.) (S.B. MHASE, J.)